Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, May 9, 2016

1. UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

   A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS381/32)

- As discussed at the April DSB meeting, the rule issued by the U.S. National Oceanic and Atmospheric Administration ("NOAA") directly addresses the DSB's findings on the U.S. dolphin safe labeling measure, and brings the United States into compliance with its WTO obligations.

- Despite discussing this rule with Mexico on a number of occasions, Mexico continues to indicate that it is not prepared to refer the matter of compliance back to a compliance panel. Rather, Mexico continues to insist that the arbitration under Article 22.6 of the DSU[1] to review Mexico's request for authorization to suspend concessions must move forward immediately. And at the DSB meeting on March 23, Mexico went so far as to say that it considered that the U.S. compliance action was not legally pertinent for the arbitration.

- Mexico appears to be pursuing a course of action that would have the DSB ignore that the measure at issue is changed and that Mexico can require the WTO to act to authorize suspension of concessions even if the United States has come into compliance.

- This is not correct.

- As a result, the United States respectfully requests that the DSB establish a compliance panel pursuant to Article 21.5 of the DSU to confirm that the United States has brought its measure into compliance with the DSB's recommendations and rulings.

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

Second Intervention

- First, the United States regrets that Mexico is raising the issue of consultations at this meeting. We will explain why Mexico's view is incorrect as a matter of substance. But just as importantly, we regret that this issue was not discussed and resolved by the parties prior to this meeting.

- The United States sought to engage with Mexico in more depth on this issue, including through discussion with the DSB Chair, but Mexico was not willing to have such a conversation. We do not consider it helpful for parties to avoid direct discussion of these DSB issues which help to reach a deeper understanding of the DSU.

- The responsibility for the effective functioning of the DSB and the dispute settlement system ultimately resides with WTO Members, and it was in this spirit that we sought, unsuccessfully, to engage in a meaningful dialogue with Mexico and the Chair.

- With respect to the disputes Mexico cites today, we would encourage Mexico to review the procedures agreed by the parties to those disputes. While parties may sometimes agree in the context of a particular dispute to hold consultations prior to the establishment of a compliance panel, it does not mean the DSU requires such consultations. In fact, when agreeing to hold consultations, parties often make explicit their agreement that the DSU does not require such consultations.[2]

- Turning to the substance, Mexico's position is not correct. There is no requirement to request consultations under Article 4 of the DSU as a condition for requesting the establishment of a compliance panel pursuant to Article 21.5 of the DSU – a point that the Appellate Body has made in two reports, one of which involved Mexico as a party.[3]

- Indeed, while recourse to the original panel is mentioned as a possible step in Article 21.5, consultations are not referred to. And we cannot see how Article 4 of the DSU could apply to an instance in which it is the Member concerned who is requesting a compliance panel to confirm that Member's compliance.

[2] *See, e.g.*, WT/DS414/14.
[3] *See Mexico – HFCS (Article 21.5) (AB)*, para. 65; *US – Continued Suspension (AB)*, para. 340.

- Accordingly, any objection to the U.S. panel request based on the failure to request Article 4 consultations could not prevent the establishment of a panel.

- We also note that, in any event, the parties have already consulted on the initial matter giving rise to the situation under Article 21.5. Further, the United States has discussed the recent rule with Mexico on a number of occasions now, including under the Understanding between the United States and Mexico Regarding Procedures under Articles 21 and 22 of the DSU.[4]

- And, of course, as we have mentioned before, the United States stands ready to consult further with Mexico on this matter as long as those consultations do not cause any delay in the compliance panel proceedings.

- Finally, we would note that this is consistent with the approach agreed under that same Understanding, which specified that Mexico was not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel.[5]

[4] *Understanding Between the United States and Mexico Regarding Procedures Under Articles 21 and 22 of the DSU*, WT/DS381/19, para. 10 (circulated Aug. 7, 2013).
[5] *Understanding Between the United States and Mexico Regarding Procedures Under Articles 21 and 22 of the DSU*, WT/DS381/19, para. 2 (circulated Aug. 7, 2013).

2. ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

A. REPORT OF THE APPELLATE BODY (WT/DS453/AB/R AND WT/DS453/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS453/R AND WT/DS453/R/ADD.1)

- The United States thanks the members of the Appellate Body, the Panel, and the Secretariat assisting them for their work on this dispute.

- As a third party in this dispute, the United States has noted throughout that the facts and circumstances are unusual. In the course of the panel proceedings, Argentina shifted Panama to "cooperating country" status for purposes of tax treatment – a shift that Argentina considered might resolve Panama's complaint, but which did not – and which the Panel appeared to construe as arbitrary and used as the basis for a number of its adverse findings.

- At the same time, a number of the legal positions taken by Panama concerning interpretation of GATS[6] provisions on national treatment, most-favored-nation treatment, and the prudential exception, appeared to be inconsistent with a plain reading of the text of the GATS.

- We therefore appreciate the Appellate Body's reversal of the Panel's approach to "like services or service suppliers". The Appellate Body recognized that a determination of "likeness" in a national treatment or most-favored-nation treatment claim under the GATS requires a rigorous analysis, taking into account all relevant facts that may bear on the "likeness" issue.

- Having resolved the appeal on the first, threshold issue of "likeness", it would have been appropriate to stop the analysis at this point. Indeed, given the unusual circumstances, there were even greater reasons than usual to consider only those issues necessary to resolve the dispute.

- Regrettably, the Appellate Body report does not take the appropriately cautious approach. Rather, it goes on to consider issues on appeal that the Appellate Body itself considered not necessary to resolve the dispute. As the report states at paragraph 6.83:

[6] General Agreement on Trade in Services (GATS).

> Our reversal of these findings [on likeness] means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, *there remains no finding of inconsistency with the GATS*. This, in turn, *renders moot the Panel's analysis* . . . pursuant to Article XIV(c) of the GATS and . . . paragraph 2(a) of the GATS Annex on Financial Services (italics added).

- But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body in paragraph 6.84 states that "[w]ith these considerations in mind, we turn to address the issues raised in Panama's appeals." That is, after clarifying that Panama's appeals concern "moot" panel findings, the Appellate Body goes on *to address* those moot appeals.

- The United States is concerned that this approach does not reflect the role of dispute settlement as set out in the DSU.[7] It is not the role of this system to make legal findings or interpretations outside the context of resolving a dispute.

- Indeed, as the Appellate Body itself noted in its report in *Wool Shirts and Blouses*: "Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context *of resolving a particular dispute*."[8]

- It follows that if an issue on appeal is not necessary to resolve a particular dispute, because for example the panel findings have been rendered "moot" as a result of another legal error, then the Appellate Body should decline to make law by resolving that unnecessary issue.

- The DSU directs panels and the Appellate Body to make *findings* on those issues of law that are necessary to assist the DSB in helping resolve the dispute.[9] Indeed, while the United States may consider certain of the Appellate Body's statements in the remaining

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
[8] *US — Wool Shirts and Blouses*, WT/DS33/AB/R & Corr.1, at 19 (italics added).
[9] *See* DSU, Articles 3.7, 7.1, 11.

46 pages of its report correct in substance, those statements are unfortunately not findings but more in the nature of *obiter dicta*. Members may wish to reflect on the significant impact that the issuance of such advisory opinions would have on the functioning of the dispute settlement system.